SCOTTISH LEGISLATION 1988

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There were seven Scottish Acts in 1988, four of them non-controversial – one to protect Scotch Whisky as we know it from inferior imitations, whether made at home or abroad, and three affecting the legal life of the nation. These simplify and modernise the rules of evidence in civil cases, consolidate legislation governing the Court of Session through the re-enactment or complete repeal of fragments of 45 statutes, and enhance the powers of the Law Society of Scotland and of the Lay Observer in bringing erring solicitors to heel.

Housing legislation, making its regular appearance, and provisions laying down the framework for the introduction of school boards, stimulated controversy. The possibilities of embarrassment for a government, in using the Scottish Grand Committee for debating the principle of any Bill when it has few Scottish constituency supporters, were highlighted in the proceedings which produced the *Electricity (Financial Provisions) Scotland Act.*

The path leading to the eventual privatisation of the two Scottish electricity boards was paved by the *Public Utility Transfers and Water Charges Act*, and the Community Charge legislation of 1987 was, as forecast, amended to keep in step with the corresponding English provisions in the *Local Government Finance Act*, both "GB" Acts not discussed here.

Chapter Number

22. *Scotch Whisky Act.* The Scotch whisky industry employs about 15,000 people, produces exports worth £1,000 million annually and contributes an equal sum annually to the Treasury.

This legislation was introduced as a private member's Bill with all-party support in both Houses, and received both Second Readings without a division. The occasion for it was proposed European Community regulation of all the main spirit drinks. This would contain a definition of whisky which it was feared would be less rigorous than that set out in the *Finance Act 1969 (c32)*, and would leave the way open for production of lower quality whisky. The proposed Community regulation allows for the making of provisions such as those set out in this Act.

Perhaps somewhat surprisingly the key to the Act is to be found in the interpretation section. This enables the Minister of Agriculture, Fisheries and Food, and the Secretary of State (listed in that order!) to make orders defining "Scotch whisky". Scotch whisky is such whisky (distilled and matured in Scotland) as conforms to such a definition.

In the euphoria that greeted this Bill, no member seems to have seized the opportunity to note that the patron saint of legislators can be none other than Humpty Dumpty himself. "When *I* use a word, it means just what I choose it

to mean, – neither more nor less."

The definition contained in an order will replace the current one in the *Finance Act 1969* and it is intended to make the new definition relate more closely to current practice in the whisky industry, after consultation with interested parties.

The detailed definition of whisky itself in the Act includes a provision that it must have matured for at least three years in wooden casks not exceeding 700 litres. This definition is based on the draft Community regulation.

The Act prohibits the production in Scotland of any whisky other than whisky that conforms to the definition contained in an order made by these ministers. It also prohibits the maturing of any such whisky in Scotland, and the keeping or use of it in Scotland for blending. These provisions may be enforced by interdicts granted by the Court of Session on the application of producers or associations of producers. Contravening spirits will be liable to forfeiture.

It will also be illegal throughout Great Britain to sell as Scotch whisky any non-conforming spirits, or any below the minimum strength specified in orders made by the ministers. The government intends to specify this strength, again after consultation with interested parties. These provisions may similarly be enforced by interdicts granted by the Court of Session or by injunctions granted by the High Court in England and Wales, on the application of producers or associations of producers.

The orders may take account of different production processes for malt and grain whisky.

The provisions of the Act may be extended to Northern Ireland by Order in Council so as to cover the whole of the United Kingdom. The law relating to whisky distilled in Northern Ireland is not affected by this Act or any Order in Council made under it.

32. *Civil Evidence (Scotland) Act.* The rules of evidence must surely reflect something inherent in the nature of any society, for it is not difficult to find astonishing variations, from swearing on the graves or the souls of one's ancestors to virtually no rules at all. The need for corroboration, which has been a cardinal principle of the rules of evidence in Scots law, both criminal and civil, may trace its origins to several ancient sources, and perhaps not least to the Second Epistle to the Corinthians (xiii, 1): "In the mouth of two or three witnesses shall every word be established".

This Act is the fruit of the Scottish Law Commission's Report on Corroboration, Hearsay and Related Matters (SLC Report No.100), published in May 1986, and the Bill received both Second Readings without a division. The Report was preceded by the usual wide consultation process of the Commission, and followed by further consultations on behalf of the Lord Advocate.

The guiding principles of the Commission, accepted by the government, were that the law should be simplified to the greatest degree consistent with the proper functioning of the law of evidence, and that as a general rule all evidence

should be admissible unless there is good reason for it to be treated otherwise (Report, para. 1.3).

The Commission had found that the requirement of corroboration and the rule against hearsay were not in the interests of justice in civil proceedings. They presented what could be looked on as technical barriers to an otherwise good case. The Act tries to ensure that a court will have before it all evidence relevant to the case.

The lay reader may be tempted to ask why these principles are inappropriate for criminal cases. The present rules may have been necessary in the days of capital punishment, because mistaken convictions could be irreversible in their consequences. But failure to convict the guilty is arguably as unsatisfactory as wrongful conviction of the innocent. Delict is the cross roads where civil and criminal law meet, and the new rules may have interesting consequences.

In this Act, civil proceedings are defined so as to include not only those in the ordinary courts of law, but also hearings by the sheriff under the *Social Work (Scotland) Act 1968 (c 49)* as to whether the grounds for referral of a child's case to a children's hearing have been established (except when the ground is alleged commission of an offence by the child), most aspects of arbitration, and of proceedings before tribunals or inquiries, except where the law lays down other rules, or these have been agreed between the parties.

Accordingly the Act abolishes the rule requiring corroboration in any civil proceedings where the court has been satisfied that any fact has been established by evidence in these proceedings. The doctrine of corroboration by false denial in affiliation actions is also abolished. Here denial by a defender of a material fact, alleged by the pursuer, that was subsequently proved to have been true, could be regarded as corroboration of the pursuer's evidence in general.

The existing law with regard to corroboration in consistorial actions, that is, those dealing with family relationships, was inconsistent. It is desirable that the grounds of action in these cases be established by evidence even in undefended cases, in order to reduce the risk or collusion. But it was not required in actions of declarator of legitimacy, illegitimacy or legitimation, or in actions of separation. Since an extract decree of separation could be accepted by a court as proof of the facts on which the decree was granted, it provided an opportunity, albeit slightly tortuous, for a collusive divorce action.

The Act tidies up the rules, by expressly requiring that the grounds of action be established in undefended cases as well as in defended ones, in actions (a) for divorce, separation or declarator of marriage, and nullity of marriage, and also (b) for legitimacy, legitimation, illegitimacy, parentage or non-parentage. In the first four of these actions (group (a)), the evidence must consist of or include evidence from a source other than a party to the real, alleged or purported marriage.

However, the Lord Advocate had already been given power under the *Divorce Jurisdiction, Court Fees and Legal Aid (Scotland) Act 1983 (c. 12)* to make orders, by statutory instrument, removing the need for corroboration in certain classes of divorce action. This was done for cases based on two or five years'

separation. So he is now given the power to make similar orders disapplying, in whole or subject to modifications, the need for external evidence in any class or classes of action within group (a) as may be specified.

The hearsay rule is familiar to all from Dickens: "You must not tell us what the soldier, or any other man, said, sir," interposed the judge; "it's not evidence." It was riddled with confusing and inconsistent exceptions. The absence of the rule in the proceedings of industrial and other tribunals had apparently caused no problems. The new rule is briefly stated in the Act, to the effect that in any civil proceedings evidence shall not be excluded solely on the ground that it is hearsay. Other rules as to the inadmissibility of evidence – such as its relevance – are untouched by this Act.

It was pointed out by the Lord Advocate that the abolition of the rule might be relevant to the consideration of the abolition of civil juries in the Court of Session which was then taking place, and subsequently rejected, but with the hope that it could be improved. The Lord President of the Court of Session, Lord Emslie, had indicated to the Lord Advocate that civil juries (of which there are now very few) might have some difficulties in evaluating hearsay evidence.

The civil jury is in fact something of a misfit in Scots law. It had died out even before the Court of Session was established in 1532, and was reintroduced with the creation of the Jury Court under the *Jury Trials (Scotland) Act 1815 (c. 42)*. At that time it appears to have been an unwelcome innovation. It was grafted on to the Court of Session in 1830. In 1868 it was reported by a Royal Commission as not having given general satisfaction. [See Lord Cooper: The Central Courts after 1532, in *Introduction to Scottish Legal History*, Stair Society Volume 20 (1958) 347].

Most previous statements by a witness were not admitted in civil cases except to attack his credibility on grounds of inconsistency with those made in court, under the *Evidence (Scotland) Act 1852 (c. 27) s.3*. This provision is now repealed; instead, previous statements, other than those included in precognitions, will be admissible in so far as they tend to reflect favourably or unfavourably on the witness's credibility. [Precognitions are accounts prepared usually by a solicitor, following an interview, of the evidence that he may perhaps optimistically expect to be given by witnesses.]

Other provisions relate to controlling the recall of witnesses even if they have been present in court since giving evidence, and the admission of additional witnesses who may have been present during any part of the proceedings.

The rules concerning admission of documents, or authenticated copies of documents (defined to include maps, plans, drawings, photographs, sound recordings, computer records, films, negatives, videotapes etc.) are liberalised, subject to the court's control. So also are those relating to proving that a particular statement does *not* exist in the records of a business or undertaking. Businesses include trades and professions, and undertakings include local and central government authorities.

The Act came into force on 3 April 1989.

36. *Court of Session Act*. The law concerning the constitution, administration and procedure of the Court of Session, and the procedure on appeal to the House of Lords, was to be found scattered in 45 Acts, the oldest having been passed in 1594, but more than half of them in the 19th century. Seven Acts passed in the present decade also had some relevance.

The Court of Session Act 1988, which came into force on 29 September 1988, repeals, and re-enacts in modern form, the living provisions of these Acts, with amendments recommended by the Scottish Law Commission. The dead wood is cut away. Legislation concerning the jurisdiction of the Court is not included in this consolidation.

The Bill had been approved by the Joint Committee on Consolidation Bills and it received both Second Readings without a division.

Rules of Court have been made by the Court of Session in recent times by Act of Sederunt, under the provisions of the *Administration of Justice (Scotland) Act 1933 (c. 41)*. In the 19th century and until 1933 much procedure was controlled by Act of Parliament.

The Act of Sederunt under which the current Rules of Court were made (SI 1985 No.321) states that the procedural provisions of any Act of Parliament or Act of Sederunt inconsistent with them are repealed. This Act now expressly repeals these superseded old procedural statutes.

37. *Electricity (Financial Provisions) (Scotland) Act*. This two-clause Act is unlikely to set the heather on fire. It merely raises the limit on the combined total borrowing powers of the two Scottish electricity boards from £2,700 million to £3,000 million. If the government's plans to privatise the electricity industry come to fruition, this will be the last Act of its type for that industry.

The Minister of State at the Scottish Office explained the background of the Bill to the Scottish Grand Committee when it considered the Bill on principle on 9th June 1988. This consideration, when it is referred to the Committee, is in substance the Second Reading debate of a Bill.

The limit on borrowing has been a joint one since 1963. This reflects the co-operation between the boards in planning and operating the generating system. It was expected that, as borrowing requirements for investment in Torness came to an end and both reactors there were fully commissioned, so the level of outstanding borrowings would drop. It is worth noting that about two-thirds of the boards' current cost net assets were financed not by borrowing but from internal resources.

To a considerable extent the 2 hours' debate was a trailer for the debates that will take place when the privatisation Bill (or Bills, if there is separate legislation for Scotland and England) is eventually introduced. The fate of Scotland's coal industry was never far from the minds of some members.

The amount of interest stimulated by this debate is demonstrated by a remark by Dennis Canavan (Falkirk, West). Apparently the Committee Room was grossly overcrowded, and he had difficulty in taking notes. There were only 34 seats on the opposition side of the room, but there are 62 Scottish opposition

members. The 10 government supporters enjoyed 51 seats. The Chairman suggested that he might move across to the government side.

In the division at the conclusion of the debate, the votes were merely Ayes 7, Noes 4. However, 47 members are recorded as having attended the Committee.

42. *Solicitors (Scotland) Act.* This Act contains a series of textual amendments to the *Solicitors (Scotland) Act 1980 (c. 46)*. Readers south of the Border will find that it has a distinct similarity to Part I of the *Administration of Justice Act 1985 (c. 61)*. It began life as a private member's Bill, drafted with the help of the government and introduced by Alistair Darling (Edinburgh Central), with government support, and that of all parties in Parliament, the Scottish Consumer Council, the Scottish Association of Citizens' Advice Bureaux, and the Lay Observer. It received both Second Readings without a division. The principal source of opposition appears to have been the Scottish Law Agents' Society.

The Act extends the powers of the Council of the Law Society so that it may investigate complaints against solicitors of "inadequate professional services", and require them, if appropriate, to refund, in whole or in part, fees paid, or to waive, in whole or part, the right to recover fees and outlays, to have any error, omission or other deficiency rectified at their own expense, and to take any other action in the client's interest as the Council may specify. The Council is required to monitor compliance with any direction it may give. A solicitor may appeal to the Scottish Solicitors' Discipline Tribunal, and thence to the Court of Session. The Council may enforce a direction with which a solicitor fails to comply, by making a complaint to the Tribunal, which is given functions to ensure that the decisions of the council are complied with, as if they were decrees in an arbitration in favour of the Council.

The expression "inadequate professional services" is defined at length – basically, those which are in any respect not of the quality which could reasonably be expected of a competent solicitor. This is less heinous than "professional misconduct".

Procedures are laid down relating to the Council's investigation of complaints.

The Scottish Solicitors' Discipline Tribunal retains its disciplinary functions in relation to professional misconduct, and it is now also empowered to deal at first instance with cases of alleged inadequate professional services. Subject to any appeal to the Court of Session, any direction made by the Tribunal may also be enforced by it as if it were a decree in an arbitration in favour of the Council.

Where it appears that a solicitor has issued an account for professional fees and outlays that is grossly excessive (undefined), the Council may withdraw his practising certificate, subject to appeal to the Court of Session. He may be required to submit his account to the Auditor of Court for taxation and to make a refund to the client. Then the suspension may be terminated unless the Council considers that he is liable to disciplinary proceedings.

The schedule of what are modestly called "minor and consequential" amendments contains some items of moment. Following representations from the Lay Observer herself, from consumer organisations and the public at large,

the Lay Observer is now given power to report cases direct to the Discipline Tribunal. This power is to be exercised only after the Law Society has itself reached a final decision on a complaint and after she in turn has issued her report, indicating her conclusions on the handling of the complaint.

Any person giving legal advice will now be able to sue for fees. Chartered accountants, surveyors, town planners and others regularly give legal advice as part and parcel of their professional life, and formerly they could charge for this service but not sue a defaulting client for that fee.

The Act also enables the Law Society to be recognised as a professional body under the provisions of the *Financial Services Act 1986 (c. 60)*.

The Act came into force on 29 January 1989.

43. *Housing (Scotland) Act.* Housing Acts are almost an annual occurrence, and existing, mainly public sector, legislation was consolidated only the previous year in the *Housing (Scotland) Act 1987 (c. 26)*. This Act follows the publication of two consultative documents, *Scottish Homes*, in May 1987 and *New Life for Urban Scotland*, in March 1988, and a White Paper, *Housing: the Government's Proposals for Scotland* [Cm 2421], in November 1987. At the end of the Second Reading debate in the Commons, voting was 315 to 210 in favour of the government; the Lords did not divide.

The Act opens with provisions for the setting up of Scottish Homes, replacing the Scottish Special Housing Association and the Housing Corporation in Scotland, but with more extensive powers. The members are appointed by the Secretary of State. Scottish Homes has the status of a public corporation, funded by the Scottish Office. So it is not regarded as a servant of the Crown, and does not enjoy any Crown immunities. The tenants that it inherits from the SSHA continue to be public sector tenants. There are provisions for the voluntary transfer of staff from the two former bodies to employment with Scottish Homes. There are naturally many consequential amendments to earlier legislation because of the new arrangements.

There are 21 items under the head of the general functions of Scottish Homes, some of which may be exercised only with the approval of the Secretary of State with the consent of the Treasury, or under a general authority given by him with its consent; others may be exercised only in accordance with arrangements made with him. The corporation has powers to acquire land compulsorily, and sales for non-domestic purposes must normally be for the best price that can reasonably be obtained. There are extensive powers to borrow, both at home and abroad, subject to Treasury control, up to £1000 million; this may be increased to £1500 million by order of the Secretary of State, with Treasury consent.

The government has expressed the hope that this Act, by abolishing "fair rents" and introducing "market rents" in new leases, will help to revive the private rented sector. Already some Building Societies and other financial institutions have expressed interest. It is clear that, if this sector could be expanded at affordable rents, much would be done to reduce homelessness in Scotland. Critics fear that "market rents" will be too high for many people, although some at least will be entitled to housing benefit. On the other hand, within a few

months of the corresponding English legislation's coming into force *The Independent* reported [13 May 1989] that in London there was an excess of property available to rent on the market, and rents for new leases had dropped by about 10%.

The crude statistics show that there are 130,000 more houses in Scotland than there are households; this figure is more than five times the number of homeless households with which local authorities deal each year, but a mixture of myth and reality has deterred many owners from letting vacant or little-used properties.

The Act provides for the phasing out of the old type of protected tenancy and introduces two new types of tenancy, assured tenancy and short assured tenancy. Assured tenancy will extend also to those cases where the tenant has exclusive occupation of some accommodation, plus the use of other shared accommodation (except where it is shared with the landlord), which would otherwise prevent the tenancy from being an assured one. In the past, sharing of toilet facilities has not prevented a tenancy from being protected under the Rent Acts, but sharing of kitchen facilities was regarded as sharing a house, and not protected.

While the tenant is given security of tenure, so that on the expiry of the contractual tenancy the assured tenancy becomes a statutory assured tenancy, there is machinery in the Act for recovery of possession by order of the sheriff. Seven of the grounds for possession are mandatory on the sheriff, while another nine give him discretion as to whether or not to order possession. There is also procedure for revision of the rent by agreement or by a rent assessment committee, which will fix the market rent, not the former fair rent system.

A short assured tenancy is an assured tenancy which is for not less than six months and in respect of which a statutory notice has been served by the intending landlord to the effect that the tenancy is a short assured tenancy. It may be continued by tacit relocation (ie leasing again without the tenant's expressly intimating an intention to renew) or by a new contract. There are provisions for recovery of possession and for review of rents by a rent assessment committee.

Damages may be awarded for wrongful eviction from residential premises, and the measure of damages is to be calculated according to the rules laid down in the Act. There are also further provisions, with penal sanctions, for the prevention of harrassment.

A novel feature is the introduction of a right for tenants to choose a new landlord in place of their existing public sector landlord, such as islands and district councils and joint boards or committees of these, New Town development corporations, the SSHA, the Housing Corporation and the new Scottish Homes.

In form, the right is actually conferred on persons approved by Scottish Homes to acquire houses from a public sector landlord. These aproved persons may be anyone other than a public sector landlord as defined above (except Scottish Homes itself), regional councils and joint boards or committees of these. The exception in favour of Scottish Homes is claimed to be because it will have

experience in setting up the new landlords, and of acting as brokers between them and tenants; transfer to Scottish Homes might on occasions be an interim step on the way to selecting an approved landlord.

In order to set the machinery in motion for exercising the right to acquire a house from a public sector landlord, the applicant must first obtain the consent in writing of the tenant (who must be a secure tenant as defined in the *Housing (Scotland) Act 1987)*, that tenant's spouse or "partner" or each secure joint tenant and spouse or "partner". This written consent must then be served on the landlord along with a notice in the form prescribed in regulations, containing a statement that the applicant seeks to exercise that right. Copies of the notice are also served on the tenant and on Scottish Homes. No secure tenant will be forced to transfer to a new landlord against his will; if the applicant withdraws his application or the tenant his consent, that is an end to the matter.

If the landlord refuses the application, by serving a "notice of refusal", or if it fails to issue an "offer to sell" notice, the applicant may seek redress from the Lands Tribunal, in which case it will stand in the shoes of the landlord and act in its place. Otherwise the landlord serves on the applicant an "offer to sell notice" (which may contain reasonable conditions that must not be prejudicial to the tenant), with a copy to the tenant, stating the house's open market value with tenant's rights. This must be established by a qualified surveyor nominated by the landlord and accepted by the applicant, or by the district valuer. The market value may be nil or negative. The conditions may be subject to negotiation, which failing the applicant may refer the matter to the Lands Tribunal for it to determine the issue.

On receipt of the "offer to sell notice", if there is no dispute outstanding, the applicant may serve a notice of acceptance on the landlord. This constitutes a binding contract of sale, but a notice of acceptance is of no effect unless the tenant and the applicant have concluded a lease for a period immediately subsequent to the sale and conditional upon the sale's proceeding. The application lapses if the notice of acceptance is not served within the time limits laid down in the Act.

The Act also contains two schedules amending the *Housing (Scotland) Act 1987*, one of them euphemistically entitled "Amendments connected with Consolidation". Both are clearly designed for the most part to remedy drafting or proof-reading errors, which may be an indication of the pressure under which our Parliamentary Draftsmen have to work.

The establishment of Scottish Homes leads to consequential amendments to the *Housing Associations Act 1985 (c. 69)*, which are to be found not only in Schedule 3 to the present Act but also in Part I of Schedule 6 to the *Housing Act 1988 (c. 50)*.

Although this last Act is in form a "GB" Act, only about 10% of its provisions apply to Scotland. Schedule 3 to the present Act, having done its work, is repealed by Schedule 18 to the "GB" Act.

Scots lawyers as usual have to go to considerable additional expense to ascertain the law. Legislation appears to be introduced, and consequently drafted, more to suit the convenience of parliamentarians than of the ultimate users. 14 years

after the publication of the Renton Report on *The Preparation of Legislation* (Cmnd 6053) their products should be more "user friendly". Eventually *Statutes in Force* will tidy this up – more expense! Private industry would not get away with this sort of behaviour without complaints to the Office of Fair Trading, or perhaps to Esther Rantzen, for a speedy reaction.

47. *School Boards (Scotland) Act*. The genesis of this Act appears to have been the failure of the school councils, for which provision is made in the *Local Government (Scotland) Act 1973 (c. 65)*, to live up to the expectations of their creators, and which they will replace where they exist.

Education authorities – the regional and islands councils – are required to establish school boards for each school in their area, except for very small schools which could not support a board. Members of the boards will normally hold office for four years, with half retiring every two years. Most boards will have from seven to thirteen members, with five in single-teacher schools. The chairman and vice-chairman are to be elected by the non-staff members from their own number, and the chairman (or, in his absence, the vice-chairman) has a casting vote on most questions.

There will be a majority of parent members, who must be parents of pupils at the school, elected by parents, staff members elected by staff from their own number, and co-opted members, who will be neither parents or staff, but may be young persons, ie, aged 16 or 17. The principles of the electoral procedure to be followed are laid down in a schedule. In the case of denominational schools, the appropriate church will nominate one of the co-opted members. Many details of the arrangements are left to be filled out in regulations. Members of staff are not eligible to be parent members. If there are not enough parent members, and a by-election does not provide enough to fill the gaps, the school board will not be established, or if established will be disestablished.

School boards may enter into contracts, and are to be treated as agents of the authority in relations with third parties. A provision to be noted is to the effect that, in the exercise of any functions given to them by or under the Act, a school board must ensure that any duty of its education authority under statute or any rule of law is duly complied with.

The boards are required to scrutinise the use of land and equipment for further education; vet, and if they choose, veto details of the head teacher's proposals as to expenditure of funds provided by the authority for the purchase of books and materials; control the use of school premises after school hours; promote contact between the school, parents and the community; encourage the formation of parent-teacher or parents' associations; arrange parents' meetings; and fix occasional holidays during term time. Much information is to be circulated, many reports to be made.

Education authorities may delegate many functions to the boards, but the regulation of the curriculum is included in the list of functions not delegated. What if the board disapproves of expenditure on particular textbooks requested by staff for the curriculum? Delegated functions may be taken away if a board fails to comply with conditions of delegation or the Act in general. A schedule sets out the rules under which an education authority may make a delegation order.

A further schedule sets out the rules for the making of senior appointments and the role of the boards in so doing.

There are provisions for travel, subsistence and attendance allowances for meetings of boards or doing anything approved by a board in connection with the discharge of its functions.

There were no divisions on the Second Reading as such in either house, but an opposition amendment to commit the Bill to a Special Standing Committee of the House of Commons was defeated by 254 votes to 198, so that the Bill was referred to a Standing Committee in the usual way. The dates when the various sections of the Act come into force are to be fixed by order of the Secretary of State.